Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JEAN MARIE LOUIS,

Petitioner,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to consider substantial constitutional challenges to a Board of Immigration Appeal's final removal order where the petitioning alien is removable based on a criminal conviction enumerated in 8 U.S.C. § 1252(a)(2)(C)?

PARTIES TO THE PROCEEDINGS

Petitioner is an individual, Jean Marie Louis. Respondent is the United States Attorney General, the Honorable John D. Ashcroft.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-2a), the Board of Immigration Appeals (*id.* at 6a-7a, 8a-15a), and the Immigration Judge (*id.* at 16a-25a) are unreported.

JURISDICTION

The Third Circuit entered its order dismissing the Petition for Review on August 22, 2003 (*id.* at 2a), and denied Petitioner's request for rehearing *en banc* on October 3, 2003. *Id.* at 4a. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1252(a)(2)(C) of 8 U.S.C. provides:

> ORDERS AGAINST CRIMINAL ALIENS. Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

STATEMENT

This case presents the important federal question that this Court expressly left open in *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001), and that is deeply dividing the lower courts: whether federal courts of appeals may consider substantial constitutional challenges to a final removal order by an alien who is removable for committing a crime identified in 8 U.S.C. § 1252(a)(2)(C).

1. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant

Responsibility Act ("IIRIRA"), 110 Stat. 3009-546, both of which contain comprehensive amendments to the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* One feature of these amendments was a provision limiting judicial review of final removal orders for aliens convicted of certain enumerated crimes ("criminal aliens"). Specifically, 8 U.S.C. § 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a covered offense.

Since AEDPA's and the IIRIRA's passage, this Court has twice considered the meaning of § 1252(a)(2)(C). In *INS v. St. Cyr*, 533 U.S. 289, 297-98 (2001), the Court held that § 1252(a)(2)(C) does not deprive the federal district courts of their traditional habeas corpus jurisdiction, 28 U.S.C. § 2241. The Court reasoned that the language of § 1252(a)(2)(C) could not overcome the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id.* at 298. The Court also noted that any other interpretation would "raise serious constitutional questions" about Congress' ability to deprive immigrants of all judicial review. *Id.* at 314.

On the same day, the Court issued its opinion in *Calcano-Martinez v. INS*, 533 U.S. 348, 349 (2001), which considered whether the federal courts of appeals have jurisdiction over a criminal alien's petition for review where the alien argues that he is entitled to a discretionary waiver of deportation under the INA. The Court concluded that § 1252(a)(2)(C) stripped the federal courts of appeals of jurisdiction to entertain such a petition. *Id.*

Importantly, the Court left open the question whether the courts of appeals could exercise jurisdiction over substantial constitutional claims raised in a petition for review:

> The scope of this preclusion [§ 1252(a)(2)(C)] is not entirely clear. Though the text of the provision is quite broad, it is not without its ambiguities. Throughout this litigation, the Government has conceded that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an "aggravated felony" within the meaning of the statute). *See* Brief for Respondent 22-23. In addition, the Government has also conceded that the courts of appeals retain jurisdiction to review "substantial constitutional challenges" raised by aliens who come within the strictures of § 1252(a)(2)(C). *See id.*, at 23-24. As the petitions in this case do not raise any of these types of issues, we need not address this point further. Nonetheless, it remains instructive that the Government acknowledges that background principles of statutory construction and constitutional concerns must be considered in determining the scope of IIRIRA's jurisdiction-stripping provisions.

Id. at 350 n.2.

2. In 1992, Petitioner Jean Marie Louis ("Louis") fled Haiti for Guantanamo Bay, Cuba, fearing persecution for his political activities, namely his role in the Committee Lavallas (an organization supporting Jean-Bertrand Aristide). Pet. App. 9a. After spending three-and-a-half months in Guantanamo, Louis was paroled to the United States. *See id.*

Once in the United States, Louis occasionally operated a "gypsy" cab. *Id.* at 10a. In January 1998, he was hired to deliver a package that, unbeknownst to him, contained marijuana. *Id.* Louis was convicted of possession of, with intent to distribute, marijuana, and sentenced to 11 1/2 to 23 months in prison. *Id.* at 14a.

3. On May 3, 2000, Louis received a Notice of Intent to Issue a Final Administrative Removal Order, charging him with removability as an alien convicted of an aggravated felony. *See* 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). A Final Administrative Removal Order was issued on June 19, 2000. Pet. App. 9a.

a. At his removal hearing, Louis argued that he would be harmed by anti-Aristide forces and detained and abused as a criminal deportee if he were returned to his homeland. *See* Pet. App. 18a. His Immigration Judge ("IJ") agreed and granted Louis a withholding of removal under Article III of the Convention Against Torture ("CAT") on February 6, 2001. Pet. App. at 24a; *see also* United Nations Convention Against Torture & Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46 (annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Nov. 20, 1994). The IJ found that Petitioner was eligible for withholding because he was a credible witness and had *not* committed a "particularly serious crime." Pet. App. 18a, 22a; *see* 8 U.S.C. §1231(b)(3)(B). In addition, the documentary evidence in the record established that criminal deportees were being indefinitely detained upon return to Haiti and tortured. Pet. App. 18a-20a. The IJ also commented that he had heard from State Department employees that criminal returnees to Haiti were indefinitely detained by Haitian officials. *Id.* at 20a

b. The INS appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), arguing that Louis had not met his burden of proof and that the IJ had wrongly relied on evidence outside of the record. Pet. App. 11a. In an opinion dated October 24, 2001, the BIA dismissed the INS's appeal. *Id.* at 15a. The BIA observed that "the evidence before us establishes that criminal returnees are being indefinitely detained upon return to Haiti, and that the country has an established record of the serious mistreatment of detainees

and prisoners. This evidence is sufficient to establish that it is more likely than not that the [Petitioner] will face torture upon return to Haiti." *Id.*

c. A year-and-a-half later, in the opinion at issue here, the BIA *sua sponte* reversed its judgment and stripped Louis of his withholding right without providing Louis any notice of the proceeding. Pet. App. 6a-7a.

Specifically, thirteen months after the BIA issued its decision granting Louis' withholding, the INS filed an untimely Motion to Reopen the case. *Id.* at 6a. Although the INS attempted to serve the motion on the attorney who had acted as Louis' counsel during the earlier proceedings, its mailing was returned "addressee unknown" because the attorney had left his prior law firm. *See* Louis' Resp. to Order to Show Cause Ex. B (filed in 3d Cir. June 19, 2003). Louis himself did not receive a copy of the motion; apparently no attempt was made to serve Louis even though he was regularly meeting with his immigration officer.

On February 26, 2003, without obtaining any input from Louis, the BIA vacated its previous decision. Pet. App. 7a. In its opinion, the BIA expressly acknowledged that the INS's motion was untimely, and thus it could not reopen the case on that motion. *See id.* at 6a; 8 C.F.R. § 3.2(c)(2). It nonetheless concluded that it could exercise *sua sponte* authority and reopened the removal proceeding. Pet. App. 6a. Based solely on its decision in an intervening case, *In re J-E-*, 23 I&N Dec. 291 (BIA 2002), the BIA concluded that there was insufficient evidence to demonstrate that Haitian authorities intentionally create and maintain conditions to inflict torture on returning immigrants. Pet. App. 7a. Louis' previous attorney received notice of this BIA Order, apparently because this time the BIA ascertained his new address from unrelated administrative records.

4. On March 28, 2003, Louis filed a Petition for Review and a Motion for Stay of Removal in the United States Court of Appeals for the Third Circuit. On June 9, 2003, the court

of appeals ordered Louis to show cause why it should not dismiss his petition for review for want of jurisdiction under 8 U.S.C. § 1252(a)(2)(C), because Louis was convicted of one of the offenses enumerated in that provision. Pet. App. 5a.

In response to the court's order, Louis argued, *inter alia*, that the federal court of appeals could exercise jurisdiction over his substantial constitutional claims, notwithstanding the language of § 1252(a)(2)(C). Louis recognized that the Third Circuit had rejected a similar argument in *Liang v. INS*, 206 F.3d 308, 316-19 (3d Cir. 2000), *cert. denied*, 533 U.S. 949 (2001), but urged the court to revisit this holding in light of *Calcano-Martinez*, 533 U.S. at 350 n.2, and *Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003)—the latter of which held in the context of a different jurisdiction-stripping provision that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."

Importantly, Respondent *agreed* that the Third Circuit "should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony." Pet. App. 27a-28a. Respondent argued only that Louis had no substantial constitutional claim. *Id.* at 28a.

On August 22, 2003, the Third Circuit dismissed Louis' petition for lack of jurisdiction. Pet. App. 1a-2a. Citing its decision in *Liang*, the court concluded that it had "no jurisdiction over a criminal alien's 'substantial constitutional claims' raised in a petition for review," and denied Louis' request for stay of removal as moot. *Id.* at 2a. The court did not consider the merits of Louis' constitutional claims. *Id.*

5. On September 5, 2003, Louis filed a timely petition for rehearing and rehearing *en banc*. The Third Circuit denied the petition on October 3, 2003. Pet. App. 3a-4a.

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision implicates a deep and persistent split of authority over the meaning of § 1252(a)(2)(C). Like the Third Circuit, the Ninth Circuit has concluded that § 1252(a)(2)(C) strips the federal appellate courts of jurisdiction to consider a criminal alien's substantial constitutional claims. In contrast, the Seventh, Eighth and Eleventh Circuits have reached the contrary conclusion, citing this Court's footnote in *Calcano-Martinez* and the background principle that federal jurisdiction over substantial constitutional claims must be expressly precluded. The Fifth Circuit has also strongly suggested in *dicta* that it agrees with these courts and will entertain such constitutional claims in the future. The split of authority, indeed, extends beyond the courts of appeals, as the Executive Branch has argued to this Court and numerous appellate courts that § 1252(a)(2)(C) cannot be read to preclude jurisdiction over a criminal alien's substantial constitutional claims and has even encouraged (to no avail) the Third and Ninth Circuits to reconsider their contrary rulings.

This split of authority should not be allowed to persist, as the jurisdictional question presented is exceedingly important to both aliens and the Executive Branch. It is well established that habeas review and judicial review are different in scope and character, such that whether direct judicial review is available impacts the arguments and remedies available to criminal aliens. In addition, resolving the split of authority now is necessary to correct the lack of procedural uniformity in the lower courts. Currently, some courts of appeals *require* criminal aliens to petition for direct review of substantial constitutional claims or forfeit those claims on habeas review, while other courts do not allow petitions for review by criminal aliens.

This petition for a writ of *certioriari* is the appropriate vehicle for resolving the important federal jurisdictional

question presented here. The Third Circuit expressly declined to review the merits of Louis' constitutional claims or consider whether his claims were "substantial" within the meaning of *Calcano-Martinez*. Rather, it expressly found jurisdiction wanting in all events. Thus, this case clearly presents the jurisdictional question directly and without an alternative holding.

Finally, review is warranted because the lower court erred. In light of the background principle that the jurisdiction of federal courts over substantial constitutional claims cannot be revoked absent a sufficiently express statement by Congress, § 1252(a)(2)(C) must be read as permitting jurisdiction over these claims. Any other reading of the provision would cause anomalies within the INA and undercut Congress' preference for judicial review of substantial constitutional claims in the courts of appeals. Accordingly, every factor that this Court usually considers when deciding whether to grant a writ of *certiorari* counsels in favor of granting this Petition.

I. THE COURT SHOULD RESOLVE THE DEEP AND PERSISTENT SPLIT OVER WHETHER § 1252(A)(2)(C) STRIPS THE COURTS OF APPEALS OF JURISDICTION OVER A CRIMINAL ALIEN'S SUBSTANTIAL CONSTITUTIONAL CLAIMS.

The federal courts of appeals are deeply divided over the question presented here—to wit, whether § 1252(a)(2)(C) strips them of jurisdiction over the substantial constitutional claims of criminal aliens.

A. The Ninth Circuit Has Joined The Third Circuit In Holding That Courts Of Appeals Are Precluded From Considering The Substantial Constitutional Claims Of Criminal Aliens.

Like the Third Circuit below and in *Liang*, the Ninth Circuit has concluded that the federal courts of appeals lack jurisdiction to consider substantial constitutional claims on

direct review. *See Chant v. Ashcroft*, No. 02-71981, 2003 WL 21782679, at *1 (9th Cir. July 29, 2003) ("Constitutional challenges to the removal of aliens who have been convicted of one of the enumerated offenses must be raised in district court through habeas petitions."); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 879 (9th Cir. 2003) ("Constitutional claims such as that of Flores-Miramontes, a controlled substance offender who raised a due process challenge to the BIA's application of a filing deadline when the INS was alleged to have caused the relevant delay . . . are therefore cognizable if at all on habeas, not direct review."); *Alibutod v. Ashcroft*, No. 02-71636, 2003 WL 21500045, at *2 (9th Cir. June 25, 2003) ("[U]nder 8 U.S.C. § 1252(a)(2)(C), we also lack jurisdiction to consider the petitioner's constitutional claims."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1064 (9th Cir. 2003) (same).

In *Cedano-Viera v. Ashcroft*, for example, the Ninth Circuit concluded that "the court of appeals, having no jurisdiction to review [a criminal alien's] removal order because he was convicted of an aggravated felony, lacks jurisdiction to consider his constitutional challenges as well . . . . [C]onstitutional claims by aliens who are subject to removal as aggravated felons must be raised in the district court through habeas corpus proceedings." 324 F.3d at 1064. The court rejected the argument "that *Calcano-Martinez* 'opens the door' for us to determine that IIRIRA's jurisdiction-stripping provisions do not divest the court of appeals of jurisdiction over substantial constitutional . . . questions." *Id.* at 1068. In the Ninth Circuit's view, "the thrust of the opinion in *Calcano-Martinez*, together with the Court's opinion in *St. Cyr* . . . is that jurisdiction over constitutional issues and statutory issues is withdrawn from the courts of appeals and that the place to resolve such issues is in the district courts through habeas corpus." *Id.* at 1069.

The Ninth Circuit nonetheless acknowledged that its decision squarely conflicts with the conclusions of other

courts that have held that "appellate courts do retain jurisdiction to review substantial constitutional challenges by aliens convicted of aggravated felonies." *Id.* at n.6 (citing *Balogun v. Ashcroft*, 270 F.3d 274, 278 n.11 (5th Cir. 2001); *Brooks v. Ashcroft*, 283 F.3d 1268, 1273 (11th Cir. 2002)).

B. The Seventh, Eighth, And Eleventh Circuits, As Well As The Executive Branch Of The United States, Have Reached The Opposite Conclusion.

In contrast to the Third and Ninth Circuits, the Seventh Circuit has held that a criminal alien's substantial constitutional challenges to a BIA removal order can be reviewed directly by the federal courts of appeals. Shortly after the passage of § 1252(a)(2)(C), the Seventh Circuit held in *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000), that the courts of appeals maintain the power to consider constitutional issues and correct "bizarre miscarriages of justice" notwithstanding § 1252(a)(2)(C)'s language. *See also Flores-Leon v. INS*, 272 F.3d 433, 437 (7th Cir. 2001) ("[W]e have previously held that an alien may challenge his deportability on constitutional grounds directly in the court of appeals provided that he raises a substantial constitutional claim." (citing *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001), and *LaGuerre*, 164 F.3d at 1040)).

More recently, in *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 679-81 (7th Cir. 2003), the Seventh Circuit expressly reaffirmed its conclusion in *LaGuerre* and held that a criminal alien raising substantial constitutional claims on *habeas* fails to satisfy the habeas exhaustion requirement unless he submits those claims to the court of appeals on direct review. As the court explained:

> In sum, this court repeatedly has acknowledged its authority to review substantial constitutional questions presented through a petition for review of a final order of the BIA. Furthermore, this court has continued to assert its jurisdiction to review substantial constitutional

> questions even after the Supreme Court's decision in *St. Cyr*. Finally, the Supreme Court has not held that the ability of the district courts to entertain an alien's habeas action negates the authority of the courts of appeals to consider substantial constitutional questions when presented through a petition for review of a decision of the BIA.

Id. at 680.

The decisional authority of the Eleventh Circuit is equally well established. In *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001), the Eleventh Circuit observed that, although § 1252(a)(2)(C) "strips us of jurisdiction to review [the criminal alien's] final order of removal," the provision "does not necessarily mandate dismissal of the petition because we still have jurisdiction . . . to evaluate substantial constitutional challenges to the INA." *Id.* at 923-24 (citing *Galindo-Del Valle v. U.S. Attorney General*, 213 F.3d 594, 598 (11th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311, 1316 n.5 (11th Cir. 1999). *See also Fernandez-Bernal v. U.S. Attorney General*, 257 F.3d 1304, 1308, 1311 (11th Cir. 2001) (same). And, in *Balogun v. U.S. Attorney General*, 304 F.3d 1303, 1305 (11th Cir. 2002), the Eleventh Circuit concluded that it had jurisdiction to consider a criminal alien's claim that he was denied due process because his immigration appeal was too difficult to understand and he was deprived of counsel, observing that, "even if § 1252(a)(2)(C) applies, appellate review of Balogun's order may still be appropriate if he raises a 'substantial constitutional' challenge to his removal." *See also id.* at 1310 ("As previously noted, several of our precedents have acknowledged such a possibility." (citing cases)); *see also Patel v. U.S. Attorney General*, 334 F.3d 1259, 1262-63 (11th Cir. 2003) ("The parties before us agree, however, that under the case law of our court, § 1252(a)(2)(C) does not strip us of jurisdiction to hear and determine substantial constitutional issues.").

The Eighth Circuit recently joined these courts and, citing the decisions of the Seventh Circuit, concluded that "[t]his Court has jurisdiction to consider substantial constitutional challenges to the Immigration and Nationality Act." *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 696 (8th Cir. 2002).

Although not directly deciding the issue, the Fifth Circuit has repeatedly indicated that it will exercise jurisdiction over substantial constitutional claims raised by criminal aliens. Initially, in *Nehme v. INS*, 252 F.3d 415, 420 (5th Cir. 2001), the court indicated that it had jurisdiction to review whether federal statutes were "being constitutionally applied" to criminal aliens. Since then, the court has observed that it "also retain[s] jurisdiction to consider whether the jurisdiction-stripping provisions of the statute are being constitutionally applied and to consider any substantial constitutional claims," but the court had no occasion to exercise this jurisdiction because no such claims were raised in the proceeding before it. *Balogun v. Ashcroft*, 270 F.3d 274, 278 n.11 (5th Cir. 2001).

The Executive Branch, moreover, has expressly stated its views on the question presented and, in doing so, has placed itself firmly within the Seventh, Eighth and Eleventh Circuits' camp. In his merits brief in *Calcano-Martinez*, the Solicitor General argued to this Court on behalf of the United States that:

> [W]e do not understand Section 1252(a)(2)(C) as precluding a court of appeals from reviewing substantial constitutional challenges to an alien's removal order, even if the BIA has found the alien to be removable based on a criminal conviction referred to in that Section. Although the preclusion of review in Section 1252(a)(2)(C) has a broad reach, we believe it is appropriate to interpret it in light of this Court's jurisprudence directing that Acts of Congress should not be construed to preclude review of constitutional claims absent a clear congressional

> expression to that effect. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974). Notwithstanding Section 1252(a)(2)(C)'s categorical language, neither the text nor the legislative history of that provision adverts specifically to preclusion of review of constitutional claims, and so the courts of appeals retain authority to consider such claims. Thus, a court of appeals would not be precluded from reviewing an alien's contention that a provision of the INA defining a particular offense as an 'aggravated felony,' or rendering the alien removable based on a conviction for that offense, is unconstitutional. Nor, in our view, would the court of appeals be precluded from reviewing a substantial contention that the immigration judge (IJ) or the BIA had not observed fundamental guarantees of due process before concluding that the alien was removable based on a conviction for such an offense.

Br. of Resp. in *Calcano-Martinez v. INS*, No. 00-1011, 2001 WL 327595, at *23-24 (filed in U.S. March 28, 2001).

Consistent with these representations, in the proceeding below and in numerous other appellate proceedings, Respondent has consistently conceded the courts of appeals' jurisdiction to review substantial constitutional claims raised in petitions for review by criminal aliens. *See Flores-Garza v. INS*, 328 F.3d 797, 801 (5th Cir. 2003) (stating the government's argument that "the statutory and constitutional claims presented by Flores's petition" could be considered by court of appeals on direct review); *Cedano-Viera*, 324 F.3d at 1068 ("Both Cedano-Viera and the government suggest that . . . we retain jurisdiction to hear constitutional claims.").

Indeed, the Executive Branch has expressly asked the Third Circuit and Ninth Circuit to reconsider their conclusion that they lack jurisdiction over a criminal aliens' substantial constitutional claims. *See* Pet. App. 27a-28a

(observing that "the government agrees that this Court should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony"); *Cedano-Viera*, 324 F.3d at 1068-69 (observing that the Federal Government had asked the Ninth Circuit to reconsider its precedent in light of *Calcano-Martinez*).

This conflict most assuredly will not resolve itself but will persist and worsen absent this Court's intervention. At this point, there is no reason to expect that the Third or Ninth Circuit will reconsider its precedent. Both courts have expressly declined the Executive Branch's aforementioned invitation to reconsider their conclusions that § 1252(a)(2)(C) strips them of jurisdiction to consider a criminal alien's substantial constitutional claims. *See* Pet. App. 2a ("We see no basis for this panel to 'revisit' *Liang* in light of *Calcano-Martinez*, or the other cases cited by Louis.") (internal citations omitted); *Cedano-Viera*, 324 F.3d at 1069 (stating of *Calcano-Martinez*, "we do not believe that it opens a door which our own precedent has closed"). And the Third Circuit has denied a motion to rehear this case *en banc* despite the deep circuit conflict on the question presented and its status as a member of the minority judicial view. Pet. App. 3a-4a.

The Seventh and Eleventh Circuits, moreover, have repeatedly reaffirmed their reading of § 1252(a)(2)(C) in the face of this circuit conflict. Indeed, just months ago, the Seventh Circuit expressly rejected the argument that it should reconsider its jurisprudence and held that the law of that circuit definitively establishes "the right of aliens to present substantial constitutional questions to this court through a petition for review of a final order of the BIA." *Robledo-Gonzales*, 342 F.3d at 681. And the Eleventh Circuit has reaffirmed the same conclusion in at least eight cases. *See Patel*, 334 F.3d at 1262-63; *Garcia v. U.S.*

Attorney General, 329 F.3d 1217, 1222 (11th Cir. 2003); *Balogun*, 304 F.3d at 1305; *Brooks v. Ashcroft*, 283 F.3d 1268, 1272-73 (11th Cir. 2002); *Oguejiofor v. U.S. Attorney General*, 277 F.3d 1305, 1308-09 (11th Cir. 2002); *Fernandez-Bernal*, 257 F.3d at 1308; *Moore*, 251 F.3d at 923-24; *Richardson*, 180 F.3d at 1316 n.5. Thus, only this Court can resolve the judicial conflict.

II. THE QUESTION PRESENTED HAS SUBSTANTIAL NATIONAL IMPORTANCE AND REQUIRES IMMEDIATE RESOLUTION BY THIS COURT.

In addition to implicating a split of authority, the question presented is one of tremendous importance both to individuals and to the Executive Branch. Failure to resolve it promptly, moreover, will cause considerable confusion in the lower courts.

The ability to have direct appellate review of a substantial constitutional claim is of considerable importance to criminal aliens. Absent direct review, the criminal alien can attempt to pursue only a habeas remedy in the district court under 28 U.S.C. § 2241. Although this Court has "declin[ed] to define the precise limit of jurisdiction under 28 U.S.C. § 2241" in the immigration context, *see* 8 Charles Gordon, *et al.*, IMMIGRATION LAW & PROCEDURE § 104.04[4][b], at 104-48.9 (Sept. 2003), habeas review "is generally more limited than on direct review." *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003); *see Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) ("[I]t is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review."). The Ninth Circuit, moreover, has suggested that habeas review may not encompass claims challenging the constitutionality of the removal process in an individual case. *See Noriega-Lopez*, 335 F.3d at 879. The INA, itself, also contains numerous other limits on the kinds of matters subject to habeas review. *See* 8 U.S.C. § 1252.

Beyond differences between the kind of review that is allowed in habeas and direct review proceedings, the ability of an alien to receive direct review without having to be "in custody" (as is required for habeas review under § 2241) is a distinction that makes a tremendous practical difference to aliens. *See* 8 IMMIGRATION LAW & PROCEDURE, *supra*, at § 104.04[5][a], [b]. An alien can pursue direct review without having to part from his or her family or operate under considerable constraints.

In addition, the question presented is substantially important from a judicial efficiency standpoint. The lack of direct review undercuts the government's and alien's ability to possibly avoid habeas proceedings altogether. As the Fifth Circuit has explained, "[t]he government appears to take this position [that substantial constitutional claims are reviewable] in order to limit the circumstances under which a § 2241 habeas proceeding may be appropriate, streamline the alien removal process, and avoid possible constitutional concerns that could be associated with the deprivation of judicial review." *Flores-Garza*, 328 F.3d at 801 n.4.

In all events, the split of authority should not be allowed to persist in light of the absence of procedural uniformity in the lower courts. Currently, criminal aliens in the Seventh, Eighth and Eleventh Circuits will forgo all review *unless* they file a petition for direct review in the court of appeals; otherwise, the alien fails to satisfy the exhaustion requirements of habeas law. *See Robledo-Gonzales*, 342 F.3d at 680-81 (constitutional claims raised on habeas unreviewable where criminal alien failed to raise them in direct review petition). The Third and Ninth Circuits, however, require no such filing of a direct review petition, although criminal aliens sometimes file petitions for review in these circuits out of "an abundance of caution." *See* Br. of Pet'r in *Tatarinov v. Ashcroft*, No. 03-70672, 2003 WL 22752980, at *2-3 (filed in 9th Cir. Sept. 24, 2003). Such non-uniformity of procedural law is intolerable in the immigration context because this area of law is "entirely

within the domain of federal authority." 8 IMMIGRATION LAW & PROCEDURE, *supra*, § 104.03, at 104-33. Moreover, allowing such differences in procedure to persist "would be in substantial tension with the interest in uniformity served by Congress' modification" of habeas laws. *Williams v. Taylor*, 529 U.S. 362, 390 n.15 (2000); *see Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (noting the importance of uniformity in the law of habeas corpus).

This case is an excellent vehicle for the Court to use in deciding whether courts of appeals may exercise jurisdiction over a criminal alien's petition for review that raises substantial constitutional claims. The court below considered this jurisdictional question in its purest form—that is, it concluded that it lacks jurisdiction over all claims raised on a petition for review by criminal aliens without evaluating whether Louis had presented "substantial" constitutional claims or deciding the merits of his constitutional claims. *See* Pet. App. 2a. As a result, this case does not have the vehicle problem that plagues some cases involving the question presented: the lower court decides both that jurisdiction exists *and* that the underlying constitutional claim lacks merit, or assumes that jurisdiction exists and decides the underlying claim against the alien, thereby providing an alternative legal rationale that might preclude the Court from reaching the merits of the question presented. *See, e.g.*, *Vasquez-Velezmoro*, 281 F.3d at 696, 698 (holding that court could exercise jurisdiction over substantial constitutional claims but deciding underlying claim lacked merit); *Oguejiofor*, 277 F.3d at 1308-09 (same); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003) (leaving jurisdictional question open and deciding constitutional claim against alien); *Lake v. Ashcroft*, No. 99-4125, 2002 WL 1770756, at *1 (2d Cir. Aug. 1, 2002) (observing that there is "some uncertainty" about jurisdiction over substantial constitutional claims under § 1252(a)(2)(C) but concluding that the court "need not resolve this issue" because no substantial constitutional claim had been

presented); *Edwards v. Ashcroft*, No. 03-1101, 2003 WL 22366183, at *1 (4th Cir. Oct. 17, 2003) (same). In short, the Court should resolve the question presented, and this is an excellent vehicle through which it can be resolved.

III. THE LOWER COURT'S JURISDICTIONAL DECISION IS ERRONEOUS.

This Court's review is further appropriate because the Third Circuit's decision is erroneous.

A. Section 1252(a)(2)(C) Does Not Preclude Appellate Court Review Of Substantial Constitutional Claims.

The lower court's conclusion was erroneous because it failed to apply the correct principle of statutory construction when reading § 1252(a)(2)(C). The court below concluded that no jurisdiction exists because § 1252(a)(2)(C) purports generally to deprive the federal courts of all jurisdiction over claims raised by criminal aliens. Pet. App. 1a-2a. In *Webster v. Doe*, 486 U.S. 592, 603 (1988), however, the Supreme Court concluded that jurisdictional statutes should not be construed to preclude judicial review of constitutional issues unless the statute says so *explicitly*. *See also Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996). Because § 1252(a)(2)(C) contains no specific language precluding review of substantial constitutional claims, it cannot properly be read as limiting the federal courts' jurisdiction over them.

Congress' failure to identify constitutional claims in § 1252(a)(2)(C) is telling in light of the fact that, when Congress enacted the provision, *Webster* was well-established precedent and aliens routinely sought review of their constitutional challenges to removal orders through petitions for review in the courts of appeals. *See, e.g.*, *Massieu v. Reno*, 91 F.3d 416, 420-24 (3d Cir. 1996) (district court lacked jurisdiction over constitutional challenge to deportation order which court of appeals had exclusive jurisdiction to entertain). Indeed, from 1961 to the

enactment of IIRIRA, review petitions in the courts of appeals were regarded as the "sole and exclusive" means for aliens to challenge their deportation orders. *See* 8 U.S.C. § 1105a(a) (1994); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982).

That Congress meant to allow substantial constitutional challenges to continue to be heard by the courts of appeals is reinforced by the IIRIRA's exclusive judicial review provisions, which reflect Congress' preference for review of removal orders in the courts of appeals, not the district courts. *See* 8 U.S.C. § 1252(a) (judicial review "is governed only" by the provisions specified); *id.* § 1252(b)(9) (judicial review of all questions of law and fact, "including interpretation and application of constitutional and statutory provisions," arising in removal proceedings "shall be available only in judicial review of a final order under this section"); *id.* § 1252(g) (stating that, except as provided in § 242 itself, courts lack jurisdiction to review "any cause or claim" arising from the Attorney General's decision or action "to commence proceedings, adjudicate cases, or execute removal orders"). Given this review scheme and § 1252(a)(2)(C)'s failure to specifically prohibit review of constitutional claims in the courts of appeals, *Webster* compels the conclusion that review of such claims should remain where it has always resided—in the courts of appeals on direct review. *See Webster*, 486 U.S. at 603.

Such a result, indeed, is the only one that makes sense of other provisions of the IIRIRA. 8 U.S.C. § 1252(b)(9), for example, provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

After requiring that *all* constitutional questions be heard in the court of appeals through review petitions, in light of the traditional axiom that specific statutes supercede general ones, this Court should look to § 1252(b)(9), not § 1252(a)(2)(C), for jurisdictional purposes.

B. Even Respondent Has Conceded The Merits Of This Argument.

For these reasons, Respondent has repeatedly argued that § 1252(a)(2)(C) cannot be understood to preclude review by the courts of appeals of substantial constitutional claims raised in direct review petitions.

Before the Ninth Circuit Court of Appeals, for example, Respondent recently argued that "to the extent that [a criminal alien] raises substantial constitutional issues, this Court retains jurisdiction to decide such issues and to address any potentially dispositive attendant statutory questions first." Br. of Resp. in *Cedano-Viera v. Ashcroft*, No. 01-70622, 2002 WL 32100095, at *30 (filed in 9th Cir. Jan. 29, 2002). Like Petitioner, Respondent cited *Webster v. Doe* for the proposition that "the Supreme Court [has] stated the general principle that jurisdictional statutes should not be construed to preclude judicial review of constitutional issues unless the statute says so explicitly," *id.* at *31, and observed that "Congress was well aware that aliens seeking review of their removal orders have often raised constitutional challenges to such orders by way of petitions for review in the Courts of Appeals." *Id.* at 31-32. Finally, Respondent argued that § 1252(a)(2)(C) must be read as ambiguous and therefore permitting review in light of *Calcano-Martinez*:

> The Supreme Court's statement in *Calcano-Martinez* that "the scope of [§ 1252(a)(2)(C)] is not entirely clear" and that "though the text of the provision is quite broad, it is not without its ambiguities" provides an express finding that [§ 1252(a)(2)(C)] is ambiguous rather than explicit in its treatment of constitutional questions. Especially in light of that ambiguity, [the court] should find that the

> presumption of reviewability emphasized by the Supreme Court in *Webster* and *St. Cyr* supports the argument that [§ 1252(a)(2)(C)] does not bar review of substantial constitutional questions in the courts of appeals.

Id. at *34 (internal citation omitted).

Respondent has, indeed, repeatedly advanced this argument in numerous courts, including this one. *See* Br. of Resp. in *Calcano-Martinez*, No. 00-1011, 2001 WL 327595, at *23-24 (filed in U.S. March 28, 2001); Br. of Resp. in *Huerta-Guevara v. Ashcroft*, No. 02-70454, 2002 WL 32102883, at *34 (filed in 9th Cir. Sept. 9, 2002); Br. of Resp. in *Nevarez-Martinez v. Ashcroft*, No. 02-70049, 2002 WL 32103295, at *12 n.3 (filed in 9th Cir. July 30, 2002); Br. of Resp. in *Garbutt v. Ashcroft*, No. 99-70002, 2001 WL 34095664, at *28-30 (filed in 9th Cir. Oct. 22, 2001); Br. of Resp. in *Chattoor v. Ashcroft*, No. 02-60087, 2002 WL 32254404, at *8-9 (filed in 5th Cir. Sep. 16, 2002); Br. of Resp. in *Bini v. Aljets*, No. 02-15101, 2002 WL 32180801, at *34 (filed in 8th Cir. Jan. 14, 2002).

Accordingly, this Court's review is necessary to correct the Third Circuit's error.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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